Designing and Resolving Mass and Class Actions

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Rodney A. Max has led more than 5,000 mediations arising from more than 12,000 cases for matters including wrongful death, personal injury, breach of contract, insurance disputes, antitrust, mass and class action issues involving products and services in all consumer areas, patent and trademark infringement, employment cases, family and decedent estate issues, fraud and negligence, health and general commercial liability insurance coverage cases. He has practiced since 1975, including representation of plaintiffs and defendants in breach of contract, fraud, commercial products liability, lender liability, mass and class actions and other statutory remedies. Mr. Max has been selected and/or court appointed as a third party neutral or mediator in a number of significant state and federal mass and class actions involving personal injury, wrongful death and property damage claims. These claims have involved products, services, and/or consumer rights (e.g., privacy). The mass and class actions have encompassed areas of insurance, pharmaceuticals, transportation, environmental, computer, cell phones, and other technological issues. He is a noted speaker on mediation and alternative dispute resolution topics, delivering his message to organizations throughout the country, including national and state bar associations and sections on both sides of the trial aisle, as well as neutral groups. Among his written works: “Mediation in Public Policy,” to be published in the Cumberland Law Review, Spring 2017; “The ‘Goal Oriented’ Approach to Mediation Negotiations,” revised for uww-adr.com, February 2014; “Formal Mediation In Professional Sports,” with Joshua J. Campbell, acctm.org, June 2012; “Breaking Impasse – The Unique Mediation Opportunity”, Professional Mediation Institute (PMI) newsletter, March 2012; “Designing the Mediation”, PMI Newsletter, March 2011; "Multiparty Mediation", The American Journal of Trial Advocacy (volume 23, Issue 2, Fall 1999) and "Mediation: The Humanization of the Justice System Resulting in the Truest Equities Among the Parties", The Alabama Defense Lawyer Journal, 1999. Mr. Max also has presented seminars on a number of his articles, including “Bringing Class Actions and Mass Claims to Resolution: A Civil and Ethical Approach”.

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Joel M. Fineberg is the Founder of Risk Settlements and creator of Class Action Settlement Insurance (CASI)—the only post-lawsuit settlement insurance available to provide risk transfer of known settlement liability. He is the industry leader in financial risk, optimal settlement design and risk transfer options, and with more than 25 years in the legal profession, Joel’s experiences have spanned a wide array of case types and roles. While handling a national class action practice, Joel experienced first-hand that companies need certainty, finality and cost containment when settling class litigation. In response to this recognized need and through his unique experience at the intersection of litigation, settlement structure and risk analysis, he founded Risk Settlements to consult on settlement structures and provide a risk-free alternative to unpredictable settlement outcomes. Joel graduated with a B.A. from Emory University and a J.D. from the Southern Methodist University Dedman School of Law and served as a Briefing Attorney for the Texas Supreme Court 1991-1992. He has received the following distinctions and honors: Best Lawyers Under 40 in Dallas - D Magazine, May 2002; Best Lawyers Under 40 in Dallas - D Magazine, May 2004 and Texas Super Lawyers for the years 2003 through 2017 published by Texas Monthly.

DESIGNING AND RESOLVING MASS AND CLASS ACTIONS

Settling class and mass actions take as much time preparing as they do mediating. Reviewing and discussing with counsel (and at times the parties) before the formal sessions can be the key to the success of the process. Few mass and class actions get resolved in one business day. Setting the pace and expectations of counsel and their clients are important ingredients to the ultimate resolution. Whether by pre-mediation phone calls or meetings, the rapport that can be established in designing the process, is the rapport that carries through the multiple sessions needed to achieve resolution. There is an overriding theme that generally assists the class and mass action process - "Nothing is agreed until everything is agreed". Such resolutions are not merely negotiating numbers; rather there is a "context" to the numbers that will bring meaning to the result. This allows the door to be opened to multiple possibilities without commitment until all is agreed. Creativity of solutions is also a component of opportunity. The mediator's toolbox of alternative options must be available to be timely used as is necessary to meet the needs and interests expressed by the parties and their counsel. The activism of the mediator translates to his/her commitment and enthusiasm, both of which can become a contagious commodity in achieving the commitment and enthusiasm of counsel and their clients to the mediation process. In the end, it becomes a true work of art.

I. Mediation Preparation:

Mediation represents a unique opportunity to bring conflicting parties together to achieve a facilitated resolution. For many conflicts, getting to the mediation is simply a matter of agreeing to mediate, identifying a mediator, and meeting on the day of mediation. However, the great majority of disputes need a certain amount of preparation. That preparation includes choosing a mediator, exchanging information between parties, providing the mediator with the position statements and preparing yourself and your client for the mediation. In complex or multiparty mediations, even greater preparation is required. This involves not only preparation of by the parties and counsel but also preparation with the mediator in advance of in person settlement discussions. As a result, pre-mediation caucuses, both jointly and separately, have been extraordinarily helpful in achieving the resolution.

To the extent that the discovery process is not complete, it is vital that an expedited exchange of information take place prior to the mediation. I have always taken the position that qualified mediation advocates with reasonable clients can evaluate reasonable goals, and can achieve common ground if they are looking at the same information. Thus, documents should be orderly exchanged to the extent this has not been done previously. To the extent that statements or depositions must be obtained, that too must be done before the mediation (the parties should be urged to take only those depositions that are vital to the evaluation of the case).

If certain preliminary motions must be heard before the case can be reasonably evaluated, they also should be presented for ruling. Certainly, dispositive motions may be a threat to one or more sides. However, if the result of such dispositive motions substantially impacts the values of the case,

consideration should be given to what extent such dispositive motions should be filed, argued, or ruled on before the mediation process proceeds. If such dispositive motions are pending, that may serve as an equalizer to the opportunity for reasonable resolution without obtaining a ruling.

The mediator should be prepared to be involved as is necessary in the orderly exchange of documents, scheduling of depositions and filing or tolling of necessary motions. The mediator's neutral position can facilitate not only a reasonable exchange of information, but also a process that will promote trustworthiness among the parties even before they get to the mediation table.

In designing a mediation, separating material issues from non-issues helps expedite the negotiation process. Therefore, identifying whether the nature of this conflict is over issues of liability, damages, both liability and damages, or over counterclaims and cross-claims will be helpful to the mediation process. Conferring with all sides on these issues is crucial. Plaintiffs may believe that it is a clear liability case with only complex issues of damages. The defendants may assert that it involves crucial liability issues as well as counterclaims and cross-claims.

Accordingly, conferring separately with plaintiffs and defendants can assist in flushing out these issues prior to the mediation. Meeting with each side, separately (and perhaps on more than one occasion), it may be helpful to bring the lawyers or parties together through conference calls or pre-mediation meetings to come up with an agreed upon strategy for dealing with liability and damages, as well as counterclaims and cross-claims. Such pre-mediation communications help avert "misexpectations" at the mediation. They also help in working through these issues so that each set of parties can deal with the issues before getting to the mediation table. Finally, such pre-mediation communications expedite the negotiation process once the day of mediation arrives.

II. Setting the Table with Opening Statements:

Opening statements can be crucial to the mediation process. If the plaintiffs have one strategy and the defendants another, these strategies may contradict one another and raise obstacles to the negotiation process. In the design of the mediation, the parties can confer with regard to their separate strategies and attempt to work together on the manner in which the opening statement will be constructive. It may be necessary for the plaintiffs to be very factual; and likewise, for the defendants to identify in an empathetic, but objective way, all of their defenses. On the other hand, it may be more appropriate for there to be a general conciliatory tone set among all those speaking on behalf of their clients. Still on other occasions it may be best for the parties to not say anything and only allow the mediator to introduce the process. Finally, it may be best that there be no opening statement or session. In a complex or multiparty mediation, these opening statement strategies should be designed by and among the parties with the assistance of the mediator before the mediation.

Among multiple parties, one issue will be whether the negotiation should be unified or diversified. That is, are the plaintiffs or defendants going to negotiate collectively or separately? Will there be diversified negotiations among different classes of plaintiffs or defendants? In some mediations, while the plaintiffs would like to negotiate collectively, the defendants may insist on individual negotiations. Through pre-mediation design, counsel and their parties can come to an agreement on the appropriate way to negotiate before they get to the mediation day. In this way the

mediation itself is not interrupted or obstructed by differences in the manner by which the parties will negotiate. Working this out prior to the mediation will allow the mediation day to be not only expedited, but also more cooperative.

Many times, non-monetary remedies are a vigorously contested component of resolution. Understanding how important such non-monetary remedies are in dealing with them prior to the mediation may be crucial to the mediation itself. This can be accomplished both through pre-mediation caucuses with counsel for the parties as well as with the parties themselves. These pre-mediation caucuses will not only assist the mediator in identifying the non-monetary interests of the parties, but also help the mediator in achieving a higher level of rapport with the parties before the mediation day. This, too, is of great importance to the overall process.

III. Fog of War:

Settlement discussions can be described as the unstoppable force meeting the immovable object. At the beginning of the process, class counsel seeks a common fund settlement which will often cost more money than the company can afford to spend for resolution. Conversely, companies enter into the settlement discussions thinking that they can talk class counsel into abandoning their class action for an individual settlement or seek a class-wide resolution using vouchers, free service and de minimis compensation for the class and their lawyers. The collision course of structure, methodology and benefit seems more likely to create spontaneous combustion rather than a harmonious exercise to locate common ground. Like the Fog of War, the Parties become blind to the impact of their respective positions which obscures the pathways to resolution.

IV. Class Counsel's Perspective:

One universal truth is that class counsel always wants to settle at any time in the litigation. Resolution achieves the policy and financial objectives of the litigation. In fact, the sooner, the better as class counsel is paid upon resolution. So the efficiency of resolution allows a pathway to payment and opportunity to work on the next matter to be monetized. Unlike their counterparts on the defense side, there is not philosophical, business or precedential reasons why settlement is bad. While companies consider whether settlement is appropriate in light of short and long term business interests, class counsel's focus tends to be on the method, manner and structure of settlement. Generally, they want a deal which meets the following criteria:

A. Creates a robust benefit to the class; This means that it will fairly compensate the class members for the alleged harm taking into account the difficulty of the case, chances of success, and availability of the fund now vs. years into the future.
B. Provide notice which meets due process requirements of Rule 23 and the Center for Federal Judiciary;
C. Create a claim process which is straightforward and fair;
D. Obtain approval for class counsels' fee request;
E. Avoid or defeat Objectors; and
F. Achieve Final, non-appealable Judgment approving the settlement.

While these general objectives seem reasonable, the specific details can wreak havoc on business. For example, a robust benefit to the class has some subjective relevance. Class counsel tends to be tone deaf as to the impact a large settlement can have on a company's balance sheet. Or, in a breach of warranty case, class counsel may believe that a full refund is robust. For the company, it may have sold millions of dollars of the product but at very thin margins. So a large refund class translates into a business ending discussion rather than a litigation ending discussion.

V. The Company's Perspective:

For the company, it goes through a fundamentally different analysis. First is whether it should settle the case at all. From a business perspective, the company may not want the reputational hit, invite regulatory scrutiny, or set a bad precedent by settling. So the pathway toward resolution is often more circuitous as there are imbedded business reasons to reject resolution. To tip the balance in favor of settlement, the economics need to be more compelling or the inertia or instinct will continue the battle. When considering settlement, companies tend to focus on several issues including:

A. What will the impact of settlement be on the company's operations, reputation and finances?
B. Will we buy peace from existing and related claims thereby ending litigation?
C. Can the company afford the cost of settlement?
D. Can the company afford the cost of continued litigation?
E. Will the company get approval of the deal internally and then from the Court?
F. What are the tax implications of settlement?
G. Will the Court approve the release?

Since companies require approval of owners, boards, senior management and counsel, they have different constituencies to satisfy which do not always vary risk and litigation in a homogenous manner. The first major impediment to resolution is the uncertain costs of settlement. Companies function with budgets, predictability and known expenditures. Decision-makers do not know how to assess the payout risk arising out of the class settlement. This makes getting internal approvals and setting business budgets highly problematic.

In addition to the uncertain costs, companies then have to wrestle with the negative financial impact of settlement on their P&L. Auditors and accountants require that the entire amount of the settlement be taken as a change immediately on the companies' books. According to Peter Robbins, CPA of Clifton, Larsen and Allen:

> Since a class action settlement agreement creates a known and probable liability, GAAP requires that the Company book the entire settlement and assumes 100% "take rate" participation in order to provide legal and financial transparency to the public regarding the claim. Thus, when a Company settles a class action lawsuit and establishes a claims-made process, it has two choices: (1) take a charge on its financial statements for the entire amount of the settlement, thereby possibly devastating its financial position to shareholders and others, or (2) purchase insurance thereby capping its maximum net liability to the amount

of the insurance premium. *Class Action Settlements: Financial and Tax Reporting,* Arizona Bar Journal (March 2013).

From the companies' perspective, taking a charge against its P&L can create the following unintended or undesirable business implications:

A. Missed or obliterated quarterly earnings;
B. Weakened financial statements;
C. Acceleration of debt for breach of loan covenants; and
D. Impact on pending or contemplated financing or M&A transactions.

As the company yields to Class Counsel's demand for a larger and larger top line settlement, the company's balance sheet suffers an equal and opposite deterioration due to the accounting rules. So every dollar used to make the settlement more robust creates more resistance due to negative business repercussions.

Once companies realize that they must account for the entire settlement on their P&L and have uncertainty as to the cost, the companies then seek to understand whether there are negative tax implications arising out of settlement. Per CPA Robbins, "if the settlement and payment represents a fine or statutory penalty (like TCPA, FCRA), then the payments are likely not tax deductible." *Class Action Settlements: Financial and Tax Reporting*, Arizona Bar Journal (March 2013). The implications of both continued litigation and settlement will cause financial, legal and business repercussion. Given the negative sequelae emanating from settlements, companies tend to move closer to resolution when the terms become more tolerable to the various constituencies weighing in on the decision. In short, the better the terms, the more certain the cost; the more efficient a deal is from accounting, tax and overall business rationale, the more appealing resolution will be for the company. The corollary is also true.

VI. Settlement Structures:

A. Common Fund Settlement:

Class Counsel often starts negotiation by demanding a common fund requiring the funds are used to pay class members, attorney fees, administrative costs and a residual *cy pres* to charity in some circumstances. From the defendant's perspective, there is little benefit from using this approach as: 1) 100% of the fund is expended even if class members do not feel aggrieved or harmed by the conduct at issue; 2) class members who file claims may receive a substantial windfall as their pro-rata claim is increased to achieve the goal of paying out the entire fund; 3) use of *cy pres* as a residual beneficiary is legally tenuous and generally unacceptable; and 4) since 100% of the settlement is paid out, the defendant seeks to minimize the size of the fund which creates a difficultly obtained agreement with class counsel and approval from the Court. All in all, the common fund is the least attractive option to a class action defendant.

B. Claims-Made Settlement:

Most companies and their retained counsel prefer a claims-made settlement structure which allows class members to submit claims and obtain a negotiated benefit. This achieves the policy goals of allowing those who think that they sustained harm or damage due to some conduct of the defendant to receive fair compensation. Also, the claims-made settlement can provide a larger benefit and compensate class members more fully than a comparable common fund.

Given the competing interests of cost, risk and resolution today, a claims-made settlement is often the only way to bridge the gap. For a settling defendant who will ultimately be held accountable for all of those qualifying claims, the response rate (how many claims will be submitted) is usually the most important variable to consider in evaluating the merits of resolution. Experienced class action attorneys agree that predicting response rates is anything but an exact science. The response rate to a claims-made settlement can vary depending on the makeup of the class, the geographic scope of the settlement, and numerous other factors, including: the type of case being settled, the amount and nature of any media coverage of the case and settlement, the type and value of benefits provided by the settlement, the nature of the notice provided to the class of the settlement, and the design of the claim process. In short, claims-filing rates will never be entirely predictable. But in exchange for not requiring that the entire fund be expended and taking the response rate risk, the settlement will typically make a larger benefit available for the class. On balance, if more class members have the ability to obtain the benefit and be compensated, then the settlement is more likely to be approved and withstand judicial scrutiny.

Since any settlement can go viral and have unpredictably high participation rates, companies always remain at risk of hitting the cap. Predicting take rate and the likely cost of the settlement is particularly difficult in todays' environment. With social media, settlement promotion sites like www.topclassactions.com which will even provide links to claim forms, claim aggregators (who charge a contingent fee to submit claims), and a more generalized awareness of class settlements, settlements run a much greater risk of going viral. This new reality adds a layer of complexity and uncertainty in deciding how to structure the class settlement. Here are some examples of cases where claims exceeded the available settlement fund:

1. Airborne:

Case: *David Wilson v. Airborne, Inc.*, Case No. 5:07-cv-770-VAP, in the United States District Court for the Central District of California.

Class: Purchasers of Airborne-branded products (including Airborne Effervescent Health Formula, Airborne On-the-Go, Airborne Power Pixies, Airborne Nighttime, Airborne Jr., Airborne Gummies, and Airborne Seasonal Relief) made between May 1, 2001 and November 29, 2007

Notice: $1.7M spent on the media campaign, which resulted in reaching 80.4% of Adults 18+ with an estimated average frequency of 2.6 times

Claims: 702,323 claims for relief received, with an aggregate face value of $36,529,796 on the $23.25M initial settlement fund

2. Nutella:

Cases: *In re Nutella Marketing and Sales Practices Litigation*, Case No. 3:11-cv-01086-FLW-DEA, in the United States District Court for the District of New Jersey and In re Ferrero Litigation Case, Case No. 11-CV-205 H (CAB), in the United States District Court for the Southern District of California

Class: All persons throughout the United States who purchased one or more of defendant's Nutella brand hazelnut spread products ("Nutella") in any state other than California, at any time from January 1, 2008 through February 3, 2012, other than for resale or distribution.

Notice: Direct and publication notice without reach and frequency calculation. Publications include *Parents, People, Ser Padres, Woman's Day*. Internet banner ads were placed totaling 15M impressions.

Claims: 210,710 claims for relief received, representing 974,126 jars with a claim value of $4, totaling an aggregate face value of $3.9M on the $2.5M settlement fund.

3. Red Bull:

Case: *Benjamin Careathers, David Wolf, Miguel Almarez, et al v. Red Bull Gmbh, Red Bull North America, Inc.* 1:13-cv-00369 in the United States District Court for the Southern District of New York.

Class: All persons who made at least one purchase of Red Bull products in the United States between January 1, 2002 and October 3, 2014.

Notice: Court-approved Notice Program included a combination of print publications, internet banner advertising, a Press Release, and search advertising. The Publication Notice appeared in *People, Sports Illustrated,* and *Wired* magazine.

Claims: 2,010,043 claims filed. Settlement Fund established of $13,000,000 comprised of cash refunds and free product to members of the Class. A pro-rata value of approximately 42.31% of the originally estimated award amounts of $10 cash and $15 in product, will be used to calculate award values due to the overwhelming response by the Class. Class members who have elected the Cash Option should receive approximately $4.23 and those who elected the Product Option should receive approximately a $6.35 value in free product.

4. Naked Juice:

Case: *Natalie Pappas v. Naked Juice Co of Glendora Inc et al* Case No.: 2:11-cv-08276 in the United States District Court for the Central District of California.

Class: All persons in the US who purchased an eligible Naked Juice Product during the period 9/27/07 to 8/19/13. Class Size: 16,500,000 Estimated

Notice: By publication in *Parade* Magazine and *People* Magazine as well as banner ads on the internet.

Claims: 758,930 claims filed, 634,278 valid claims approved. Settlement Fund of $9,000,000. Initial benefit was to be: valid claims to be fully reimbursed with proof of purchase up to $75 and without proof of purchase $5 to $45; Because of the overwhelming response the valid claims with proof of purchase paid up to $14.64 and without proof of purchase $.98 to $8.78.

5. *Starkist:*

Case: *Patrick Hendricks, et al v. Starkist Company* 4:13-cv-00729 in the United States District Court for the Northern District of California.

Class: Residents of the United States who, from February 19, 2009 through October 31, 2014, purchased any of the StarKist Products (i.e., 5 oz. Chunk Light in Water, 5 oz. Chunk Light in Oil, 5 oz. Solid White in Water, and 5 oz. Solid White in Oil).

Notice: The notice provided for publication in *People* and the *San Francisco Examiner*; it included an Internet banner campaign, press release, toll-free number, settlement website, Facebook page, and direct notice to roughly 40,600 class members identifiable from Defendant's records. Of the Class Members who received direct notice, approximately 6,090 were sent an email, and an additional 34,510 were sent a postcard by U.S. Mail. Affiliates of NBC and ABC, Time.com, Consumerist.com, and The New York Times also reported news of the settlement.

Claims: You may submit a claim for either (a) a cash payment of $25, or (b) $50 in product vouchers redeemable for StarKist tuna products. Settlement fund $12,000,000 - The settlement provided that StarKist will pay $8 million in cash and $4 million in vouchers redeemable for StarKist tuna products. Of the 2,512,034 claims submitted, 902,643 members chose to receive vouchers and 1,609,391 Class Members chose to receive cash.

In these cases, the companies may not have anticipated that 100% or more of the available benefit would have been claimed. But by designing a claim structure and process, companies must accept the risk that all of the settlement that could be paid out of the fund would be claimed. However, that is the real risk which exists with any class action settlement.

C. Insured Claims-Made Settlement:

In order to solve the major impediments to resolution, companies have an alternative option: Insured Claims-Made Settlement. This allows the company to design a large, robust settlement making a substantial benefit available to the class without the financial uncertainty resulting from resolution. Using risk transfer, the settling company can substitute a known amount (the cost of the policy premium) for an unknown amount (the total cost of qualifying claims that will ultimately be submitted by class members). The insurance company—not the settling defendant—bears the risk that the total payout will be greater than predicted.

Now there is a defined calculable cost to the company to determine whether settlement achieves all financial, legal and business objectives. If news of the settlement goes viral and catches fire, the company does not need to fear that its business will burn down. The risk of wildfire is now contained.

Below are case studies involving insured claims-made settlements:

1. ***Marketing and Labeling Case Study*:**

The Situation: A business needed to settle over $1.3 billion in sales liability from "all natural" labeling and marketing, but a claims process would place millions of dollars at risk for the business. Further, the settlement presented a risk that the claims would go viral, and there was not an effective way to eliminate waste, fraud and abuse. For the company, resolution presented an existential threat to its very existence.

The Risk Settlements Solution: Using proprietary data and Class Action Settlement Insurance (CASI), Risk Settlements designed a customized settlement structure that rolled-up all legacy liability arising from marketing an entire product line of "all natural products." With the risk transfer solution, the company was able to achieve a settlement that met its legal, business and financial objectives.

The Results: By structuring the settlement to capture all products and SKUs of the business, Risk Settlements helped the company achieve peace on approximately $1.3 billion in liability and backstopped the settlement with insurance to cap the substantial downside risk.

2. ***Consumer Products Case Study***:

The Situation: A highly-leveraged company facing substantial consumer products class action liability was unable to structure a settlement that met its liability and financial constraints due to significant exposure and illiquidity. If the settlement liability hit the company's P&L, the company would have been in default of its loan covenants, resulting in the debt holders taking the assets of the company for liquidation.

The Risk Settlements Solution: Risk Settlements worked with the company and defense counsel to restructure the settlement using CASI, providing the company with a fixed-cost solution that removed all the financial risk.

The Results: By structuring the settlement in a way that preserved much-needed capital and provided a risk transfer option, Risk Settlements not only created an efficient exit to the litigation, but also saved the company from defaulting on its outstanding loans and being taken over by its creditors. The solution helped settle significant product liability exposure, capped liability and salvaged the company.

3. ***Telephone Consumer Protection Act (TCPA) Case Study***:

The Situation: A business facing a TCPA class action lawsuit considered carrying the full liability of a $15 million common fund settlement on their books as a massive liquidated loss for several months or years. The company was in the midst of an M&A transaction that was threatened by the existence of the lawsuit and uncertain settlement liability.

The Risk Settlements Solution: Using proprietary data and CASI, Risk Settlements restructured the settlement to transfer 100% of the settlement risk to an insurer while providing the defending business with $7.5 million in cost efficiencies.

The Results: By restructuring the settlement, Risk Settlements removed the claims volatility, risk and uncertainty, freeing up the company's balance sheet. The company resolved the case, capped the risk and was able to effectuate its M&A transaction, as the settlement uncertainty had been removed.

VII. Breaking the Impasse:

Mediation provides a unique opportunity for the parties as it relates to the opportunity of a negotiated resolution of their case. Typically, in a negotiation, one party gets to his/her/its goal, the other party gets to his/her/its goal, and rarely are those goals the same. If impasse occurs, litigation will commence, continue, or be completed. Absent facilitation, no one is encouraging getting back to re-evaluation or re-negotiation. Certainly someone can suggest continuing negotiation, but typically neither side wants to show the other such interest (it being perceived as a weakness in the negotiation process).

Mediation, on the other hand, brings to the table that facilitation that is otherwise missing in a pure negotiation context. The neutral, while there to facilitate the negotiations, is also there as an advocate for the process. The mediator represents resolution similar to the responsibility of an attorney to represent his/her client. The mediator is going to work as hard for the process as the attorneys are going to work for their respective parties.

In this regard, the mediator serves as both the vehicle and the opportunity for breaking impasse. The sooner the mediator is brought into the process, the better and more able the mediator is to assist the parties in getting to "yes". The mediator can assist with the exchange of information, as well as, the exchange of communications, as well as, the exchange of offers. The mediator can expedite information

gathered, as well as, filter communications. Therefore, "breaking impasse" becomes the mediator's responsibility from beginning to end. Here are some strategies:

A. Calling the Leadership:

It is not unusual in complex cases for each room to have a number of participants—both lawyers and non-lawyers. Among the lawyers there may be in-house counsel, as well as, outside counsel; there may be referral attorneys, as well as, litigating attorneys. As for the parties there may be the Plaintiff, as well as, Plaintiff's family (sometimes to include extended family). On the Defendant's side, there may be corporate representatives, as well as, insurance coverage representatives. Among insurance representatives there may be primary carriers, as well as, excess carriers. Speaking to a particular side involves a multitude of personalities, interests, and perhaps negotiating strategies. The ability to call on the leadership of each room is a matter of timing, as well as, identification. Who is the right person to call on at that right time to meet with the right representative from the other side? Sometimes this requires more than one person from each side.

In a case where two companies were suing one another (one on a promissory note and the other on fraud) each room had a combination of corporate representatives, in-house counsel and outside counsel. It was clear that the formal position of the parties would not and could not achieve resolution. (Each side was insisting on the flow of money going to them not from them). The ability to break impasse was the ability to bring the corporate representatives together to make a business decision as opposed to a litigating decision. This could not occur the first thing in the morning nor after opening session. In fact, it could not occur until both sides had frustrated their formal negotiating positions and reached a point where their negotiating strategy had, in essence, failed with neither party willing to cross the demarcation line of zero. The opportunity of bringing the corporate representatives into a room (with the agreement of their counsel—both in-house and outside) was the key to the ultimate resolution. In a private session, the parties agreed to enter into a buy-sell arrangement of the outstanding minority shares which one party had of the other parties' company. The note was forgiven and the claim for fraud was dismissed. The case was resolved.

In a case where sixty-three property owners were being sued for wrongful death and personal injury of several workers, each room had a multitude of parties, party representatives, and/or attorneys. Prior to the mediation, leaders from both rooms emerged among counsel so as to be able to look for direction from that counsel during various stages of the negotiation. By establishing this leadership prior to the mediation, the parties knew who the leadership was and the mediator knew who the "go to" persons were so that after a multiple day mediation, all claims of all parties were resolved against all Defendants.

There are circumstances where insurance representatives may have conflicting interests with corporate representatives, or where insurance representatives have conflicting interests among themselves (especially where primary and excess carriers have different interests to protect). So too in a Plaintiff's room where there may be differing interests between the Plaintiff's referral attorney, the litigating attorney, and a guardian ad litem. In each case, calling on leadership at the right time avoids divisiveness and gets direction where impasse may otherwise occur.

Once that leadership is identified and can be brought together from the respective sides, separate or joint dialogue can occur to (1) rebuild trust, (2) define goals, and (3) find a new direction to the negotiation that is mutually acceptable.

B. Court Direction:

Court direction can be a vital tool whether suggested or actually implemented. Where parties have varying views as to what a judge, jury, or appellate court will do, the opportunity of "testing it" can be a means of breaking impasse. Such court opportunities exist with pre-trial conferences, summary judgments, and settlement conferences. They also exist in mock juries, focus groups or settlement juries.

Where a court can give some direction without the parties disclosing the status of their actual negotiations, such direction can be very helpful. A summary judgment motion as it may relate to one or more issues may, likewise, be of great help. It is usually best to keep the judge away from the actual settlement between the parties; however, there may be times that the judge can assist in requiring all parties or persons with full settlement authority to be present—whether in subsequent settlement conference or in a court ordered re-mediation.

While pre-trial conferences, summary judgments, and settlement conferences are well- known, mock juries or focus groups and settlement juries may not. Mock juries and focus groups give the parties an opportunity to test the receptiveness of their position before assimilated jurors of similar backgrounds to that of the venue at issue. When such mock juries or focus groups produce conflicting results (Plaintiffs' focus group shows results contrary to what the Defendants' focus group may show—resulting in impasse), a mediation focus group may be in order. Such a mediation focus group allows the mediator to facilitate assimilating a group of jurors and allow each party to make their own private presentation to said jury. Thereafter, the jury can render a decision and confidentially answer confidential questions posed by each side. Neither side will know the other's questions or the jury's answer to those questions. To the extent that a verdict is requested, it will be forthcoming and made known as agreed upon by the parties. Obviously, any such result is non- binding and remains confidential as to the participants.

The implementation of a court order or focus group may not be necessary. Merely the suggestion of the utilization of such direction may allow the parties to re-think their positions and provoke further dialogue and re-evaluation.

C. Conditional Offers:

Where negotiations are stalled either because the Plaintiffs are too high or the Defendants are too low, conditional offers can be a means of breaking impasse. Where Plaintiffs will not move below $10,000,000 and the Defendants suggest the opportunity of negotiating is in six digits, conditional offers can free the parties from the "cancer" of relationship bargaining. Many times, higher offers from Plaintiffs and lower counter-offers from Defendants are provoked because each side is looking at the relationship of their offer to that of the other side. Such relationship bargaining is not helpful to the mediation process.

While the mediator will typically urge the parties to make negotiating moves, not in relationship to the other sides' numbers, but in relationship to their own goals, often times the parties do not abide by such worthy suggestion, or cannot do so. It is in this circumstance that conditional offers play a role. Many times, such conditional offers must await several rounds of negotiation. However, when the parties remain very far apart after two or three moves, sometimes conditional offers are called on at an earlier stage.

Conditional offers are also known as bracketing or framing of the negotiation. The benefit of the conditional offer is that where a Plaintiff will not go below $10,000,000 because a Defendant has not gotten to $1,000,000 (or vice versa); a conditional offer can suggest that the Plaintiff will come below $10,000,000, if the Defendant will come to a certain level. Alternatively, a Defendant can indicate that it is willing to go to a certain level if, and only if, the Plaintiff comes below a certain level.

While it is each side's intention to get the other side to accept the conditional offer or bracketing, the failure of such acceptance is not fatal. In fact, it can assist in "jump starting" the negotiations. That is to say that where the parties have been above $10,000,000 and below $1,000,000, a conditional offer from the Plaintiff can suggest some seven digit area that the Defendant may be able to accept or be willing to negotiate at a different or competing bracket. Once the brackets are identified, there is a means of negotiating between the brackets, typically called "negotiating" or "narrowing" the brackets. A number of offers or counter-offers involving bracketing can get the parties to "yes" in an expedited fashion. Bracketing opportunities can reinvigorate the process.

D. Bridging the Gap:

In some cases, negotiations break down over the potential benefit to the class members. Finding solutions which meet the settlement paradigm required by each party can be challenging. To bridge the settlement divide, the following solutions are useful to create a win/win resolution:

1. Cash/Coupon Combination:

In cases where the defendant can offer a coupon or voucher for services can create an added benefit at a lower cost. Structured the right way, this is not a coupon settlement. Instead, it is an alternative benefit structure which gives class members a choice. The benefit can be structured where the class members are offered a cash benefit of X and a noncash voucher of 2x. This provides a choice for class members. If fees are based upon the cash component, then the settlement is compliant with all of the terms of CAFA. For the settling defendant, it is likely that the voucher – even at 2x – will have a lower cost than cash payments. In Red Bull, approximately 33% of the claims were for the voucher. Class members who elected this benefit achieved 50% more value than the cash alternative and it had a lower cost than the cash to the company. This strategy may be very appealing to both sides.

2. Cash Tail:

Under CAFA, pure coupon or nonmonetary settlements are subject to higher scrutiny and challenge. In some cases, companies seek to make goods or services available as the first-choice benefit. To strike the balance, companies can consider providing a benefit which is used for goods or

services over a specified period of time. Rather than making the settlement purely noncash, the parties may want to consider providing a cash option or cash tail. If the class member elects not to use the voucher for goods or services, he can turn the voucher in for cash after the agreed upon time frame. Make this benefit transferable and redeemable for cash and the company can structure a deal which has a lower cost than straight cash refund yet does not run afoul of the CAFA restrictions.

3. Sliding Scale Matrix:

In cases where the settlement fund is smaller than the potential exposure (example: $1,000,000 capped fund where 100,000 class members could each claim $100 which represents $10M in exposure), then consider building in an internal sliding scale payout. This way, if certain claim thresholds are met, then the benefit is reduced in a pre-negotiated sliding scale. This approach allows a larger initial per class member benefit and adjusts down as claims increase. If the settlement goes viral as discussed above, the benefit would be reduced pro-rata anyway. By using this mechanism, the settling company may be willing to offer a larger initial per class member benefit with the compromise that the benefit can be reduced at certain thresholds. This provides both sides a valuable concession making some deals possible when they would otherwise have been out of reach.

E. Mediator's Proposal:

Where the parties have gotten to the point that neither side will make any further movement, impasse occurs. In a negotiation, "it's over". In a mediation, "it's just begun". The mediator and the parties need to realize that the Mediator's Proposal may be the mediator's one "silver bullet" to assist the parties in resolving their case. Therefore, it must generally be used with a high level of discretion and at the end of the negotiating process to break the impasse.

This proposal cannot be a proposal of any one party. Rather, it must be that of the mediator. The Mediator's Proposal is not a suggestion of what the judge, arbitrator or jury will do; rather it must be understood to be in the context of the mediation. That is to say, that the Mediator's Proposal is an effort to "stretch" both parties beyond that which they would otherwise move in a negotiated fashion, but not so far as to lose the opportunity of obtaining a resolution. In essence, it is a "Mediator's Proposal" and not a proposal of a judge, jury, or appellate court.

The mediator must first determine that the parties are willing to accept the concept of a Mediator's Proposal. That concept works as follows: If the concept is accepted, the mediator will determine that number above and below which he/she thinks the parties will be willing to go. The number is published to both sides either separately or jointly (typically, it is done separately). The mediator then solicits two yeses or otherwise publishes two no's. The responses will be and will remain strictly confidential. The mediator will never disclose what a party individually says. The mediator will simply disclose two yeses or two no's. If the mediator confidentially hears a yes and a no, he/she will only publish 2 no's. The mediator will never disclose if any one party said yes. Sometimes the parties can make their response at the mediation itself. Sometimes the mediation must adjourn to give the parties an opportunity to re-evaluate their position in light of the proposal made.

While sometimes the only issue is “the number”, there are occasions—especially in complex cases—where other terms and conditions must be a part of this proposal. Accordingly, the mediator should include all material terms as a part of the Mediator’s Proposal. Such terms include non-monetary remedies, as well as, monetary remedies. They include payment terms, releases, and dismissals. Some proposals can be quite brief; others may be quite elaborate. Some proposals may need to take stages, i.e. preliminary framework approval and thereafter, more specific details, terms and conditions. Once the Mediator’s Proposal is established and communicated, the parties should be given a reasonable period of time for determining its acceptability and delivering their confidential response to the mediator. Considerations in this regard are as follows: (1) Should you allow the parties to leave the mediation session and have the opportunity to consult with other people? (Sometimes this can be very helpful; sometimes it can be very harmful.) (2) Do the parties need to seek advice of persons of higher authority whether individually, committees or boards? (3) Is it helpful to “get away” from the table, take a “breather”, and “sleep on it”? (Again, this can be both helpful and harmful depending on the circumstances and the people involved). Such a reasonable time-period, therefore, must be determined under the particular circumstances of the mediation. The Mediator’s Proposal is the most unique aspect of a mediation that clearly separates the value of the mediation process from that of the negotiation process. The successfully executed Mediator’s Proposal makes the difference in breaking impasse.

VIII. CONCLUSION:

Parties call on the mediation process anticipating that a third person is necessary to help the parties do what they cannot otherwise do. Mediation concepts such as convening or designing the mediation, conducting opening sessions, and facilitating negotiations all have their own unique values. Breaking impasse is the most vital role a mediator can be called on to achieve. The parties must be patient with both the mediator and the process so as to be able to look for such opportunities at the right time in the right way. Premature efforts to break impasse will result in failure. Allowing the parties to define their own impasse and then be prepared to do something about it is vital. Remember to establish the distinction between breaking impasse of the process and breaking impasse of the negotiations. The former should be considered at an earlier stage, the latter should be considered at a later stage. Each case has its own timeline; and other than a general statement, no one rule can apply to all mediation circumstances. The mediator’s ability to break impasse of process or negotiations at the right time in the right way is the key to a successful mediation.